United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig and affidavit of mailing

76-2103

To be argued by
STANLEY MARCUS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2103

ADDEQUAYE ALLOTEY,

Appellant,

—*against*—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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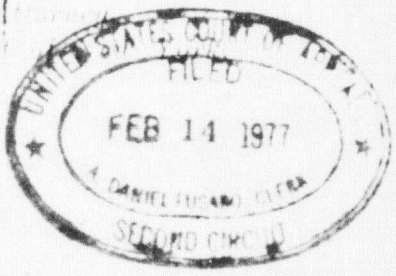

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Docket No. 76-2103

ADDEQUAYE ALLOTEY,

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Preliminary Statement

Addequaye Allotey appeals *pro se* from an order entered on August 31, 1976, in the United States District Court for the Eastern District of New York (Dooling, *J.*) denying appellant's post-conviction petition under T. 28, U.S.C., § 2255 to vacate the judgment and sentence imposed on March 21, 1975.

Appellant and his wife, Enid Allotey, were convicted on March 21, 1975, upon their pleas of guilty, to Count thirty-two (wire fraud) of a thirty-eight count indictment which charged them with various counts of mail and wire fraud (T. 18, U.S.C., §§ 1341, 1343). Appellant was sentenced on March 21, 1975 to a term of imprisonment of three years pursuant to the provisions of T. 18, U.S.C., § 4208(a)(2). Appellant was released from incarceration on July 23, 1975 and was terminated

from parole on August 28, 1976. There are presently pending against appellant Immigration and Naturalization Service exclusion proceedings.

Appellant, represented by counsel before the district court, moved to set aside his guilty plea and the judgment of conviction, on December 24, 1975, asserting that his guilty plea was not voluntary, that he was denied effective assistance of counsel, that he did not understand the nature of the charge and the consequences of his plea, and that there was no factual basis for the plea of guilty. After holding a lengthy hearing on August 5, 6 and 9, 1976, at which time appellant and his wife, along with four Government witnesses, testified, Judge Dooling, making extensive findings of fact, denied appellant's petition, in a twenty-page opinion, filed on August 31, 1976. Construing liberally appellant's *pro se* appeal, he seems to be urging the same contentions upon this Court.

Statement of Facts

The Indictment

The thirty-eight count mail and wire fraud indictment returned against the appellant and his wife charged a general scheme wherein some $2,000,000 was obtained from Oficial Agricola de Comercia e Industria de Fernando Po ("Camara"), an agent of the Republic of Equatorial Guinea, Africa, by false and fraudulent means.

Specifically, the indictment alleged that the Alloteys, doing business as Stephan & Company, contracted with Camara on two separate occasions to import a total of 4000 metric tons of cocoa beans into the United States at thirty-four cents per pound. The contract to purchase

the first shipment of 2000 metric tons was entered into on September 8, 1970. Shortly thereafter, General Cocoa Company, a New York based cocoa dealer, agreed to buy the entire first shipment from the Alloteys at the prevailing market price at the time of delivery.

While the first cocoa shipment was in transit from Equatorial Guinea, the Alloteys entered into another contract with Camara on November 2, 1970 to purchase another 2000 metric tons of cocoa, also at thirty-four cents per pound. General Cocoa Company agreed to purchase the entire second shipment at the same terms negotiated for the first shipment. By November, 1970, however, the market price of cocoa had dipped to thirty cents per pound with forecasts of further price erosion.

By March 18, 1971, the first shipment was delivered and the Alloteys received over $1,000,000 from General Cocoa pursuant to their contract. However, none of this money was sent to Camara to effect payment. Camara then advised the Alloteys that it would refuse to release the shipping documents for the second shipment until the Alloteys forwarded one-half the purchase price of the second shipment, amounting to some $749,000.00. The Alloteys were able to satisfy Camara by securing an advance from General Cocoa for that amount on March 29, 1971. Camara then released the documents and was paid nothing more, although the Alloteys received subsequent payments for the second shipment amounting to over $108,000 from General Cocoa.

The indictment further charged that during the period January-June, 1971, the Alloteys thwarted the repeated efforts of Mack Higginbotham, collection officer for Irving Trust Co., Camara's American collection agent, to obtain the money owed to Camara, and caused to be sent "lulling" letters and cables promising payment

in the near future, when in fact the Alloteys had converted to their own use the proceeds realized from the sale of the two shipments of cocoa beans to General Cocoa Company.

The Plea and Sentence[1]

Shortly after the Alloteys were arraigned on August 2, 1974, they retained Gustave Gerber, Esq., as their attorney. Gerber prepared the defendants' case for the next several months. On February 19, 1975, the Government prosecutor, Assistant U.S. Attorney Joseph Ryan, Jr., informed Gerber that he had travelled to the Bahamas and had gathered a series of documents which showed that the Alloteys had dissipated, largely by gambling at Freeport and the Bahamas, in excess of $1,000,000, a substantial part of the proceeds of the two shipments (8/5 Tr. 195-198).[2]

Having been advised of this gloomy situation and with the trial only two weeks away, Gerber suggested that the Alloteys accept the Government's offer to plead guilty to one count in the indictment. After a series of meetings with their lawyer, the prosecutor, his paralegal assistant and an Immigration officer, on February 20 and 21, 1975, the defendants agreed to plead guilty only to that portion of the scheme wherein they lulled Camara into not pursuing collection. This

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[1] The transcript of the plea and sentencing minutes have been included within the Government's appendix, references to which are preceded by the letter "A.".

[2] Since the transcript of the hearing was not consecutively paginated, references thereto will be preceded by the date of the appropriate transcript. Thus, "8/5 Tr. 68" refers to Page 68 of the August 5, 1976 transcript.

charge was embodied in several counts of the indictment, including Count 32, the count finally agreed upon as the pleading count. The plea was taken before Judge Dooling on February 21, 1975 (8/5 Tr. 199-206).

The sentence proceeding, on March 21, 1975, was delayed some three hours in order to afford appellant an opportunity to confer with his wife and lawyer regarding the plea which he had previously entered. Judge Dooling, referring to a letter which he had received on March 18, 1975, in which appellant asserted his innocence to the underlying charges, pointed out that the letter seemed to preclude the plea. After the recess, appellant renewed his desire to have the plea of February 21, 1975 stand, and he was sentenced at that time.

The Hearing

In a series of affidavits filed with the District Court in support of the § 2255 petition, and at the evidentiary hearing, appellant and his wife made the following allegations: that appellant never understood the nature of the charge to which he pleaded; that both the prosecutor and his own attorney, Gustave Gerber, assured appellant that he was simply pleading to a misdemeanor; that appellant's attorney failed to discuss the possibility of a plea disposition with him prior to February 20, 1975; that appellant's attorney told him Judge Dooling wanted him to plead guilty and if appellant did not, that the government would "throw the book at him;" that appellant's lawyer refused to present documents and communications to the court; that an Immigration and Naturalization Service criminal investigator, Joseph Sena, assured appellant, although he was not an American national, having been extradicted from Ghana, that he would not be excluded from the United States so long

as his papers were in order; and, finally, that at no time was appellant or his wife shown the cable evidencing the wire fraud charge embodied in Count 32, the pleading count, asserting, rather, that the plea was made to a cable, allegedly forged, which formed the basis of another count, Count 33 (8/5 Tr. 18, 35, 37, 39, 157, 172; 8/6 Tr. 14).

On cross-examination of appellant, a number of significant inconsistencies emerged. Appellant asserted in his affidavit in support of the § 2255 motion that he was denied effective assistance of counsel. Yet, at the hearing, he admitted that he was satisfied with the performance of his attorney (8/5 Tr. 68). Indeed, his attorney saw him at the West Street jail at least twelve times and visited him and his wife together on several other occasions at the Marshal's *office and the United States Attorney's Office* (8/5 Tr. 69). His attorney advised the appellant that he had examined documents concerning the cocoa transactions (8/5 Tr. 89, 90) and interviewed several witnesses about the case (8/5 Tr. 90-96).

Appellant also claimed that he did not understand the nature of the charge to which he pleaded guilty. Yet, on cross-examination, the appellant admitted that he was aware that he was charged with criminal fraud as early as August 2, 1974, and continued to be aware of the charge when he pleaded guilty on February 21, 1975 (8/5 Tr. 123-125). He understood that he could be imprisoned for up to five years and fined up to $1000 (8/5 Tr. 137) and that he was not merely pleading guilty to a commercial default (8/5 Tr. 138). Indeed, he also admitted on cross-examination knowing that the High Court of Justice of Ghana, in granting extradition, had characterized the case as a fraud case, and that both his own counsel and the Assistant United States Attorney had explained the charge to him (8/5 Tr. 115, 122-123).

The appellant also contended that he was coerced into pleading guilty by virtue of the alleged assurances of the Immigration officer, his lawyer and the prosecutor that he would not be deported (8/5 Tr. 140-41). However, on cross-examination, appellant testified that he told Judge Dooling the truth when he advised the court that no promises had been made to him to induce his plea (8/5 Tr. 143-44).

The Government called four witnesses: Assistant United States Attorney Joseph Ryan; appellant's attorney, Gustave Gerber; Immigration officer Joseph Sena; and Thomas Sclafani, Mr. Ryan's assistant.

Ryan testified that on February 19, 1975, a few days after he had returned from a trip to the Bahamas, he met with Mr. Gerber in order to present to Gerber the findings of his trip (8/5 Tr. 195). Present at the meeting was Mr. Sclafani (8/9 Tr. 32). Ryan advised Gerber that the records he had obtained from the Alloteys' Bahamian bank and two casinos clearly showed that most of the proceeds of the two cocoa shipments had been gambled and lost in the casinos. The remainder of the money was traced to other expenditures of a personal nature—the rental of a yacht, an expensive hotel suite, the purchase of jewelry, etc. The evidence gathered also indicated that the Alloteys "defrauded" other vendors and credit card companies out of thousands of dollars. Gerber was shown a flow chart which traced virtually all of the proceeds received by the Alloteys from General Cocoa, through various bank accounts and into the casinos, as well as many of the other documents obtained on the trip (8/5 Tr. 196-198; 8/9 Tr. 32-34).

Gerber appeared surprised since he had repeatedly asked the Alloteys what they had done with the proceeds of the two shipments (8/9 Tr. 34). The meeting ended

with Ryan again offering a plea to one count in the indictment. Gerber said that he would again speak to his clients about a disposition. An agreement was made to meet the next day at the United States Attorney's office, with the Alloteys present, to explain to them the nature of the Government's case (8/9 Tr. 34-35).

On February 20, 1975, Gerber and his clients met with Ryan and Sclafani in the United States Attorney's conference room. Ryan explained to the Alloteys in detail the nature of the charges pending against them, and the nature of the Government's anticipated proof at trial. They were shown critical documents including copies of checks which they had cashed in gambling casinos, casino gambling markers, and corresponding bank records. While they insisted that they had not set out to defraud anyone in September, 1970, they finally agreed that at the time they caused various lulling cables to be sent to Camara and its agents in early 1971, they had no intention of paying the money owed to Camara (8/5 Tr. 199-206; 8/9 Tr. 35-40).

The discussion then centered on which count the Alloteys should plead to, since they were admitting guilt to only a portion of the indictment. Ryan suggested Count 33, but that was unsatisfactory because the Alloteys claimed that the cable underlying the Count was forged (8/9 Tr. 41-44). Ryan next suggested that he prepare an information which would encompass the approximate portion of the scheme. The information was drafted, but eventually rejected by the Alloteys after conferring privately with Gerber (8/9 Tr. 46-48). Ryan then suggested that the Alloteys plead guilty to Count 32. They balked at first, because the actual cable cited in Count 32 was a wire from Camara to Stephen & Company dated February 23, 1971. Ryan explained that the February 23 cable was the last in a series of wire communications

beginning with Higgenbotham's phone call to Mrs. Allotey asking about payment, and that Paragraph Four of the indictment stood as the foundation for that count. With this understanding, the Alloteys inspected the Count 32 cable and conferred alone with Gerber. They agreed to plead guilty to Count 32, again fully realizing that it was a criminal charge (8/9 Tr. 48-52; 8/6 Tr. 99).

At this point in the meeting, appellant, a national of Ghana, expressed concern about the impact his plea would have upon his immigration status. Ryan, unable to answer appellant's question, told the Alloteys that he would attempt to enlist the assistance of an immigration official (8/9 Tr. 53-54). The next morning, February 21, 1975, the Alloteys and Messrs. Gerber, Ryan and Sclafani again met in the United States Attorney's conference room. Joseph Sena, a criminal investigator for the Immigration Service, also appeared. He advised the Alloteys that the appellant would not be immediately excluded from this country upon his conviction. Rather, a hearing would be held by an immigration judge, who would make a determination of the appellant's status after considering all the evidence. Sena pointed out that the fact that appellant had an American wife and children would operate in his favor, but that the fraud conviction would hurt his case. Sena made no promises or forecasts; he simply advised the Alloteys that the matter of appellant's deportation would ultimately be for the immigration judge to decide. Mr. Sena then departed and the Alloteys entered their plea later that day. (8/5 Tr. 208-211; 8/9 Tr. 54-58).

Flatly contradicting the assertions of appellant, Gustave Gerber testified that at no point did he coerce or threaten Allotey into pleading guilty, nor did he ever tell appellant that the sentencing judge was in a "bad mood" or that the Government would "throw the book at him"

if he withdrew his plea, or that the plea was "nothing at all," a mere equivalent of a misdemeanor (8 6 Tr. 101-102). Moreover, Gerber then testified he told Allotey that he would have to admit his guilt to a criminal charge of fraud in open court before Judge Dooling, and that the court would not accept the plea unless it was satisfied of the factual predicate (8 6 Tr. 104). Gerber also testified that appellant was regularly advised of all developments concerning the case, including the Government's offer to dispose of the entire case by a plea, prior to February 20, 1975 (8 6 Tr. 87). Finally, Gerber denied ever receiving a communication or document from appellant (8 6 Tr. 93), thus refuting appellant's contention at the hearing that he had advised his attorney in writing that he wished to withdraw his guilty plea.

ARGUMENT

The trial court properly denied appellant's post-conviction § 2255 petition to vacate the judgment and sentence of March 21, 1975.

After an extensive three day hearing, Judge Dooling rejected appellant's § 2255 petition and made extensive and specific findings of fact and conclusions of law.

Specifically, the Judge concluded in his memorandum opinion and order of August 31, 1976,

> "that petitioner's plea of guilty was entered in a full understanding of the charge and of his own guilty complicity and that the plea was not induced by any promise that petitioner would be safe from exclusion and deportation if he pleaded, or by any representation that the charge being pleaded to was no worse than a misdemeanor, or that the plea did not admit criminal responsibility." (A. 122-123).

The Judge also concluded that there was no truth in the appellant's allegation that counsel was inadequate.

These findings are amply supported by the transcripts of the plea taken on February 21, 1975 (A. 18-41), the sentencing proceeding on March 21, 1975 (A. 44-103), and most important, by the extensive § 2255 hearing and the testimony adduced at that time. Recognizing that the issues in contention turned principally upon the credibility of the appellant and his wife, and the truth of their account about the meetings of February 20 and 21, 1975, the court found that:

> "Neither petitioner nor his wife testified truthfully about the meetings of February 20, 21. They quite understood what they were doing in the September 1970-June 1971 period and negotiated a plea only after they were convinced that the Bermuda evidence made conviction a practical certainty. They were content to be spared the humiliation of pleading to a charge that they had never intended to pay from the very beginning.
>
> The plea taking on February 21, 1975, is very clear. There is no indication whatever that either petitioner or his wife misunderstood the plea or that any promise about deportation was made." (A. 116).

Indeed, the testimony of the appellant was incredible on its face. It was replete with inconsistencies and flatly contradicted by appellant's own lawyer, Gustave Gerber, Assistant United States Attorney Joseph Ryan, Immigration Officer Joseph Sena, and para-legal specialist Thomas Sclafani.

Judge Dooling found that the appellant was advised of the nature of the charge by his own counsel, by Assist-

ant United States Attorney Ryan, and by the Court itself at the time the plea was entered on February 21, 1975, and again on March 21, 1975, the day of sentencing.[3] Additionally, the court found that the appellant was advised of the fraud charge by the High Court of Justice of Ghana during extradition proceedings; that the appellant himself admitted knowing the nature of the charges; that appellant's account of what happened during a recess on March 21, 1975, must also be rejected; that appellant's counsel in no way coerced him into pleading guilty; and that at no time did Immigration Officer Joseph Sena advise appellant that he would not be deported or excluded from the United States (A. 9, 115, 116, 121).

It is well settled that the district court's finding can only be set aside if clearly erroneous, especially where its findings turn upon the credibility of witnesses. *United States* v. *Pfingst*, 490 F.2d 262, 273 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *Zovluck* v. *United States*, 448 F.2d 339 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). Thus, for example, in *United States* v. *Pfingst*, 490 F.2d at 273, Chief Judge Kaufman, writing for the Court, noted:

> "Because the District Court's findings of fact played a crucial role in the decision below, we believe it essential at the outset of our discussion to reiterate the narrow scope of our review of

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[3] On February 21, 1975, after Judge Dooling explained the nature and consequences of the charge to which he would plead (A. 20-26), the appellant clearly indicated that he understood the charge (A. 27) and stated that he was guilty of the charge (A. 28). Moreover, on March 21, 1975, Assistant United States Attorney Ryan detailed the portion of the scheme to which the appellant pleaded. The Court then asked the appellant whether the charge as outlined by Mr. Ryan was what he pleaded guilty to and the appellant responded affirmatively. (A. 71).

> such findings. On appeal, we will not disturb findings of fact, determined after a hearing on a motion made pursuant to 28 U.S.C., § 2255 unless those findings are clearly erroneous . . . . [citing *Zovluck*]. This standard of review is particularly appropriate in this case for an evaluation of the credibility of the witnesses who testified before the district judge was of fundamental importance in the resolution of conflicting testimony."

Appellant Addequaye Allotey had every reason to fabricate his testimony since his conviction forms the principal basis upon which he may be excluded from this country. Thus, in a desperate effort to cleanse his record, the appellant has pressed forward with his petition and now this appeal. The only error appellant apparently assigns to Judge Dooling is that he disbelieved the testimony of both himself and his wife, and credited the testimony of the Government's witnesses. Based upon the record, no reasonable man could do otherwise.

CONCLUSION

The order of the District Court dated August 31, 1976 should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
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*Of Counsel.**

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* The United States Attorney wishes to acknowledge the assistance of Thomas D. Sclafani, a para-legal specialist.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 14th day of February, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE AND APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Addequaye Allotey
2304 Grand Avenue
Bronx, New York 10468

Evelyn Valenti

Sworn to before me this
14th day of Feb. 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 77